SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

724

No. 724

BENARD SOUTH AND HAROLD C. FLEMING,
Appellants,

vs.

JAMES PETERS, AS CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OF APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES— MOTION TO DISMISS OR AFFIRM.

Now come the appellees, pursuant to Rule 12 of the Supreme Court of the United States, and file this their statement of matters making against the jurisdiction of the Supreme Court of the United States to review the

order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

Statement of the Matter Involved

The relief sought by appellants, who are white male voters of Fulton County, is a permanent injunction to restrain the operation of a statute of Georgia dealing with primary elections by political parties, by enjoining the "Georgia State Democratic Party," alleged to consist of more than 600,000 unidentified members, the "Executive Committee" of the party, and the "Chairman" and "Secretary" of said Committee, from performing their duties under the State statute, and by enjoining the "Secretary of State of Georgia" from performing his official duties under other statutes, the performance of which will have the effect of recognizing the statute under attack.[1] A declaration is sought that the statute is unconstitutional.

In the original complaint the statute was attacked as violative of the equal protection clause of the Fourteenth Amendment and, as to nomination of United States Senators, as violative of the Seventeenth Amendment. An additional contention was added by amendment that the statute was violative of the "privileges or immunities" clause of the Fourteenth Amendment.

The State law in question is an act of 1917 relating to party primary elections, known as the Neill Primary Act. The history and operation of the law are set forth in

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[1] The court found: "The Secretary of State does not represent the State otherwise, nor appear for it. The Chairman and Acting Secretary of the Executive Committee represents the Democratic Party in the functions of their offices but do not appear to have been authorized by the other members of the party or the Executive Committee to represent them as litigants. The Party is a voluntary association whose membership is constantly changing and uncertain."

detail in the opinion of the District Court.[2] It is not confined in its application to any one political party, and does not require that a primary election be held. If any party chooses to hold a primary election, the provisions of the statute become applicable. To obtain an effective injunction the court must control the action of the party, the executive committee of the party, and the chairman and secretary of the party, and also must control the action of the Secretary of State of Georgia with respect to the General Election in November, 1950, in performing duties under other statutes not themselves attacked.[3]

While the primary law was enacted in 1917, and has governed all party primary elections since that time, it substantially adopted party primary rules and practices which had governed party primary elections since the first State-wide party primary election was held in the

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[2] The gist of the law is that if any political party shall decide to hold a party primary to nominate candidates for State-wide elections the candidate receiving the greatest number of votes in any county shall be deemed to have carried that county and shall be entitled to the "unit" vote of such county in determining the nominee of the party. The "unit" vote is related to the constitutional representation in the lower House of the General Assembly, each County having two unit votes for each such representative. The eight largest counties each have three representatives, the thirty next largest have two each, and the remaining counties have one each. Reapportionment on the basis of population is made after each United States census. To be nominated for Governor or United States Senator a candidate must receive a majority of the county unit votes. Provision is made for a "run-off" election in certain cases, and for the popular vote nominating in case of a tie in "unit" votes.

[3] By other statutes not directly attacked it is the duty of the Secretary of State of Georgia to send out ballot forms to the ordinaries of the several counties, and it is sought to enjoin him from placing on the ballots any Democratic Party candidate nominated by county unit vote, on the theory that to do so would give recognition to an invalid statute. The ordinary is a constitutional county officer, who supervises general elections, appoints the managers at each county precinct, and has the duty of providing all necessary forms. He has the ballots printed following the form sent to him by the Secretary of State as to state offices and adding, on the same ballot, candidates for local offices.

State in 1898. The principle of the county unit system has prevailed in party conventions from the earliest days of party politics in the State. Under the statute itself, and prior to 1917 under the rules of the party, all party candidates for United States Senator have been nominated by county unit vote since the Seventeenth Amendment was ratified in 1913.

Appellants do not assert anything personal or peculiar to themselves which distinguishes them from other voters of Fulton County, but contend that under the Neill Primary Act due recognition is not given to the population of Fulton County, the most populous county in the State, and that a vote in Fulton County does not have the same value under the County Unit System as a vote in the less populated counties.[4]

The case was heard before a three-judge District Court on February 24, 1950. An order denying the relief sought and dismissing the petition was entered on March 15, 1950, and filed the same day.

Statement of Grounds of Motion

1

THE RECORD FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. Appellees contend that no substantial Federal question is involved because the right of appellants to vote in a State primary election for the nomination of party

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[4] According to the 1920 census the population of Fulton County was 232,606, or 8.03% of the State's population. According to the 1940 census it was 392,886 or 12.58%. Plaintiffs contend that the population of Fulton County has further increased in 1948 to an estimated 468,000, or an estimated 14.58% of the State's population. It will thus be seen that much of the alleged disproportion in unit votes is the result of population growths and shifts since the law has been in effect. According to the latest official census when the law was enacted in 1917 the Fulton County population was 177,732, or 6.81% of the State's population.

candidates does not arise under the Constitution and laws of the United States, but under the laws of the State.

Cases believed to support this contention are:

Minor v. *Happersett*, 21 Wall. 162, 22 L. ed. 627;
United States v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588;
United States v. *Reese*, 92 U. S. 214, 23 L. ed. 567;
McPherson v. *Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3;
Breedlove v. *Suttles*, 302 U. S. 277, 82 L. ed. 252, 58 S. Ct. 205.

This does not deny that the Fifteenth and Nineteenth Amendments forbid the denial of voting rights on account of race, color or previous condition of servitude, or on account of sex. Nor does it deny that under the Seventeenth Amendment United States Senators are to be elected "by the people" of the State rather than "by the Legislature thereof." It affirms, however, that voting rights are State derived subject only to valid Federal restraints upon the State in prescribing the exercise of those rights. For instance, the right to vote is deemed in a sense to be conferred upon Negroes by the Fifteenth Amendment, *proprio vigore*, "in any State which may by its laws confine that right to white persons." *Ex parte Yarbrough*, 110 U. S. 651, 23 L. ed. 567.

There is no provision of the Federal Constitution or of any Federal statute which "forbid(s) that a State may, in an election affecting the whole State, or a portion thereof, subdivide the territory affected into smaller units, to-wit, counties, for the purpose of taking the vote and ascertaining the result, the sub-divisions having materially different populations."[5]

[5] Quoted language is from a statement of the question in the opinion of the District Court.

We believe this contention is fully sustained by:

Wood v. *Broom*, 287 U. S. 1, 53 S. Ct. 1;
Colegrove v. *Green*, 328 U. S. 549;
Colegrove v. *Barrett*, 330 U. S. 804, 67 S. Ct. 973; and
MacDougall v. *Green*, 335 U. S. 281, 69 S. Ct. 1; 93 L. ed. 1.[6]

B. The rule just stated clearly applies to nominations of candidates for Governor and other State offices. Appellees contend that it is not different because a candidate for the United States Senate is also to be nominated.

The Seventeenth Amendment provides that the electors of United States Senators in each State "shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." Article I, Sec. 4, Par. 1 of the Federal Constitution empowers the Congress to make or alter State regulations prescribing the "Times, Places and Manner" of holding elections for Senators, but until that power is exercised by the Congress, and subject to restrictions applicable equally to elections for State offices, elections of United States Senators are matters of internal State control, and the fact that a United States Senator will be nominated as a candidate of the party does not supply the substantial Federal question which is absent with respect to State offices.

It is believed that this contention is sustained by the following cases:

Wood v. *Broom*, *supra*;
Newberry v. *United States*, 256 U. S. 232, 65 L. ed. 913, 41 S. Ct. 469;

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[6] In *MacDougall* v. *Green*, the Court said:

"It is allowable State policy to require that candidates for State-wide office should have support not limited to a concentrated locality. This is not a unique policy."

Colegrove v. *Green, supra;*
MacDougall v. *Green, supra;* and
Breedlove v. *Suttles, supra.*[7]

2

THE QUESTIONS PRESENTED BY THE RECORD ARE PURELY POLITICAL

A. Appellees contend that a political rather than justiciable controversy is presented by the record because the complainants assert no rights in themselves as individuals, or injury to themselves as individuals. If a wrong is done it is a public wrong, not private.

It is believed that this contention is supported by:

Colegrove v. *Green, supra.*

Appellants do not contend that they are denied the right to register and vote in the party primary election. They do not deny that their votes will be received and counted. Their complaint is that a voting system which applies to party primary elections discriminates against the value of the votes in the political subdivision in which they reside. Their complaint is that the system gives unit recognition to each of the counties of the State, and while they do not attack the system as a unit system, they say that by the incidence of their residence at the moment within the area of a particular political subdivision they

[7] *Breedlove* v. *Suttles* involved a Georgia statute which required the levy and collection of a poll tax. The Seventeenth Amendment was not specifically mentioned, but the voting right which was involved necessarily included the right to vote for United States Senators. The court said that the statute did not deny any privilege or immunity protected by the Fourteenth Amendment, "since the privilege of voting is not derived from the United States but is conferred by the State, and, except as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."

are discriminated against in common with all other residents of that political area. Thus they complain in behalf of all the people who constitute that particular unit of the State's society.

While they demonstrate, mathematically, that the majority or plurality vote in Fulton County does not cast a unit vote in the proportion which the county population bears to the State population, they admittedly have as individuals the same voting right which is possessed by every other voter in the same political society.[8]

B. Whether or not the complaint presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is specially true of Federal Courts of equity.

Cases sustaining this contention are:

In re Sawyer, 124 U. S. 200; 31 L. ed. 402; 8 S. Ct. 482;

Giles v. *Harris*, 189 U. S. 475, 47 L. ed. 909; 23 S. Ct. 639;

Walton v. *House of Representatives*, 265 U. S. 487; 68 L. ed. 1116; 44 S. Ct. 628; and

Colegrove v. *Green, supra.*

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[8] Appellants offered no evidence to show even that the voters in Fulton County had suffered in any past primary election by reason of the application of the county unit rule. Appellees showed that in every primary election since the Neill Primary Act in 1917, the successful candidate for Governor under the unit system had received, with one single exception, at least a plurality of the popular vote of the State, and without a single exception the successful candidate for United States Senator had received a plurality of the popular vote, and an actual majority except in one single election. Also in every race for United States Senator, with one possible exception in 1920, the successful candidate had received the unit vote of Fulton County. In every race but four the successful candidate for Governor had received the unit vote of Fulton County, and in the 1948 primary every candidate for office received a majority or plurality of both the unit vote and the popular vote. In every case except one the candidate also received the Fulton County vote, and in that case, while he did not receive the Fulton County vote, he received a majority of all the popular vote of the State. It is, of course, idle to speculate what the results of future primary elections may be.

The rule that a Federal Court of equity is without jurisdiction of political questions, or to enforce political rights, is so firmly established that the Supreme Court ought not to allow an appeal presenting such a question.

An amendment to the complaint filed by appellants but emphasizes the political nature of the questions presented.[9]

C. The fact that declaratory relief is sought does not enlarge the subject matter of the Court's jurisdiction.

Cases sustaining this contention are:

Colegrove v. *Green, supra;*

Eccles v. *Peoples Bank,* 333 U. S. 426; 68 S. Ct. 641; 92 L. ed. 784;

Alabama State Federation v. *McAdory,* 325 U. S. 450; 65 S. Ct. 1384; 89 L. ed. 1725;

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[9] The amendment alleged: "The County Unit System has its origin in the antagonisms and hostilities of the rural political elements in Georgia against the urban centers and cities of Georgia. Said County Unit System has the present effect of substantially disfranchising plaintiffs as citizens of an urban community, and such result is the present intent and purpose of the application of said County Unit System to primary elections in Georgia. The County Unit System has the additional present effect and purpose of preventing the Negro and organized labor and liberal elements of urban communities, including Fulton County, from having their votes effectively counted in primary elections."

Appellants chief witness testified:

"Q. If we didn't have the unit system, Doctor, you think the urban area would control the rural area?

"A. *Yes, sir.*" (Emphasis supplied.)

The District Court found, however, "The evidence does not disclose any legislative purpose to array county against city or to intentionally disfranchise urban voters. The history of the State, and of the political parties within it, shows that political power has from the beginning been exerted to a large extent through counties as voting units, along similar unit lines. We find as a fact that there was no bad or discriminatory intent in the Neill Act, beyond what necessarily follows from its provisions."

Contrast the facts in *Colegrove* v. *Green, supra,* where the District Court found, and the State's Attorney General admitted a long continued deliberate defiance of the Federal Constitution, characterized as being "as obstinate as it is unpatriotic." (Record, *Colegrove* v. *Green,* p. 40).

Great Lakes Co. v. *Huffman,* 319 U. S. 293; 63 S. Ct. 1070; 87 L. ed. 1407;
United Public Workers v. *Mitchell,* 330 U. S. 75, 91 L. ed. 754, 767.

D. With particular reference to the office of United States Senator appellees contend that no justiciable controversy is presented by the record because the complaint contemplates an adjudication by the court as to who may be elected to the Senate of the United States, and seeks to make the court rather than the Senate the tribunal for determining the validity of elections to the Senate. By Article I, Sec. 5, Par. 1 of the Constitution the power to determine the validity of elections to the Senate is vested solely in the Senate. This Court has held election proceedings in the Congress to be judicial and not legislative, and to be exclusive of all judicial proceedings in the courts. Since the court would have no jurisdiction to pass upon the validity of an election after the election was held, *a fortiori,* it could not in effect pass upon the validity of an election to be held in the future.

It is believed that this contention is sustained by the following cases:

Barry v. *United States,* 279 U. S. 597; 73 L. ed. 867; 49 S. Ct. 452; and
Colegrove v. *Green, supra.*

At the very best the mandate of the Seventeenth Amendment that United States Senators shall be elected by the people is directed to and its performance is entrusted to the legislative departments of the State and Federal governments. The Congress has not fixed the manner of holding elections for Senators, and until it does so they remain under the power of the State Legislature. The courts can no more provide the election contemplated by the Seven-

teenth Amendment than they can guarantee to the States a Republican form of government.

3

THIS PROCEEDING IS ONE AGAINST THE STATE OF GEORGIA, AND IS INHIBITED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

A. Aside from the fact that appellees are sued in their official capacities, including the Secretary of State of Georgia, the object of the proceeding is to govern and control State action with respect to elections, and appellees contend that it is in effect a proceeding against the State.

We believe this contention is sustained by:

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682; 93 L. ed. 1392; 69 S. Ct. 1457;

Mine Safety Appliances Co. v. *Forrestal*, 326 U. S. 371; 66 S. Ct. 219; 90 L. ed. 140;

Giles v. *Harris*, *supra*.

It is pointed out that no property right is involved in the proceeding. The action which is sought to be enjoined is not action directed against the appellants. Begging the distinction between primary and general elections, it is action of the State Legislature taken in the performance of a duty owed to the State and to all the people of the State to provide state-wide election machinery, and to secure for the State a Republican form of government. It is action which concerns the welfare of the whole State, not of a single county but of all the counties. Appellants ask the Federal government to prevent or control the State government in respect to matters which affect the polity of the State. They ask the judicial department of the Federal government to prevent or control the legislative department of the State government.

B. Whether required to do so as a matter of jurisdiction, or impelled in its own discretion to do so, appellees contend that the Federal judiciary should refrain from taking jurisdiction of a political question of the nature here involved, for the purpose of coercing State officers in the performance of their official duties, where the State itself has courts of concurrent jurisdiction, and where all of the relief sought could with equal propriety be granted by the State courts, and where no effort of any sort is shown to have been made within the State to obtain such relief.

It is believed that this contention is sustained by:

Railroad Commissioners of Texas v. *Pullman Co.*, 312 U. S. 496; 85 L. ed. 971; 61 S. Ct. 643; and

Chicago v. *Fieldcrest Dairies*, 316 U. S. 168; 62 S. Ct. 986; 86 L. ed. 1355.

The Seventeenth Amendment is not a part of the Constitution of Georgia, but the Georgia Constitution of 1945 (Art. XII, Sec. 1, Par. 1) adopts it as a part of the supreme law of the State.[10]

Also it is no answer to say that the Constitution of Georgia does not have an equal protection clause.

It provides:

> "Protection to person and property is the paramount duty of Government, and shall be impartial and complete." Article I, Sec. 1, Par. 2, Constitution of Georgia.[11]

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[10] "The laws of general operation in this State are: first: As the Supreme Law; The Constitution of the United States, the laws of the United States in pursuance thereof and all treaties made under the authority of the United States." Article XII, Sec. 1, Par. 1, Constitution of Georgia.

[11] "That provision in the Constitution of the State which declares that protection to person and property shall be impartial and complete is the equivalent of a declaration that no person shall be denied the equal protection of the laws."

Railroad Co. v. *Wright*, 125 Ga. 589(12); 54 S. E. 52.

There is no reason to believe that if the appellants here have any rights in the present situation based upon any provision of the Federal Constitution there will be any failure of the Georgia courts to protect them.

4

The questions presented here were presented in another proceeding in the same court by other plaintiffs, suing in the same right, less than four years ago.

Turman v. *Duckworth* (N. D. Ga.) 68 F. Supp. 744;
Turman v. *Duckworth,* 329 U. S. 675; 67 S. Ct. 21; 91 L. ed. 596;
Cook v. *Fortson* (N. D. Ga.) 68 F. Supp. 624;
Cook v. *Fortson,* 329 U. S. 675; 67 S. Ct. 21, 91 L. ed. 596.

In the former cases different plaintiffs appeared, but in both the former cases and the present case the plaintiffs asserted the same rights as voters of Fulton County, in their own behalf and in behalf of others similarly situated.

In *Turman* v. *Duckworth,* different persons holding the same party offices were named as defendants. The same Secretary of State sued there is sued now. The relief sought was an injunction against the operation of the same statute and a declaration of invalidity.

The office of United States Senator was not involved, but in *Cook* v. *Fortson,* decided at the same time, and involving the same basic question, the office of Congressman was involved.

Since those cases, no material change has been made in the statute, and no census has been taken which changes the population figures.

Aside from the question of *res judicata,* appellees contend that the former decisions should set the question at rest.

WHEREFORE, appellees respectfully submit this statement, showing that the questions upon which the decision of this Court depend are so unsubstantial as not to need further argument or further consideration of this Court, and appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment by the District Court of the United States for the Northern District of Georgia.

This, March 31, 1950.

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